No. 85-1513

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EDWIN W. EDWARDS, *et al.*,
Appellants,

v.

DON AGUILLARD, *et al.*,
Appellees.

On Appeal From The
United States Court of Appeals
For The Fifth Circuit

BRIEF AMICUS CURIAE OF CONCERNED WOMEN FOR AMERICA IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS	1
I. A LAW THAT MERELY COINCIDES WITH A RELIGIOUS DOCTRINE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE	3
II. A LAW'S ALLEGED "RELIGIOUS PURPOSE" SHOULD NOT ALONE BE SUFFICIENT TO DECLARE A LAW UNCONSTITUTIONAL	7
CONCLUSION	11

TABLE OF AUTHORITIES

	Page
Andrews v. *Shulsen*, 600 F.Supp. 408 (D. Utah 1984)	8
Crowley v. *Smithsonian Institution*, 636 F.2d 738 (D.C. Cir. 1980)	6
Epperson v. *Arkansas*, 393 U.S. 97 (1968)	4
Harris v. *McRae*, 448 U.S. 297 (1980)	4, 5, 7
Hatheway v. *Secretary of Army*, 641 F.2d 1376 (9th Cir. 1981)	6
Lemon v. *Kurtzman*, 403 U.S. 602 (1971)	7, 9
McGowan v. *Maryland*, 366 U.S. 420 (1961)	3, 5, 7
National Gay Task Force v. *Bd. of Ed. of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984)	6
People v. *Baldwin*, 37 Cal.App.3d 485, 112 Cal.Rptr. 290 (1974)	6
Stewart v. *U.S.*, 364 A.2d 1205 (D.C. Ct. of App. 1976)	6
Wallace v. *Jaffree*, 472 U.S. ____, 86 L.Ed.2d 29 (1985)	9
Witters v. *Washington Dept. of Services for the Blind*, 474 U.S. ____, 88 L.Ed.2d 846 (1986)	1

CONSTITUTIONAL PROVISIONS:

U.S. Constitution, First Amendment ..... *passim*

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INTEREST OF AMICUS

Concerned Women for America is a national, nonprofit womens' organization of over 500,000 members. CWA works through lobbying and litigation to promote religious liberty and traditional moral values in American law and government. CWA attorneys have appeared before this Court, see *Larry Witters* v. *Washington Dept.*

of Services for the Blind, 474 U.S. ____, 88 L.Ed.2d 846 (1986).

The Fifth Circuit Court of Appeals struck down Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science (La. Rev. Stat. 286.1 et seq.) Concerned Women for America believes the Fifth Circuit's opinion departs widely from this Court's precedents, and threatens established constitutional liberties, recognized by this Court. The Fifth Circuit, in essence, ruled that a state cannot mandate the teaching of a certain subject, if that material happens to coincide with the tenets of some religious faith.

Also, the Fifth Circuit said that a law is unconstitutional if the court perceives a religious motive among the lawmakers, regardless of any ostensible secular purpose, or the actual effect of the law. The three-judge panel made the incredible statement that, ". . . whether it is fully supported by scientific evidence, the theory of creation is a religious belief," (Jurisdictional Statement, at A-7).

Concerned Women for America urges reversal, arguing that many, if not all, laws coincide with the beliefs of some religious group. Possibly, some lawmakers vote in favor of a law because of their personal religious beliefs, but no evidence supports that assertion in this case. Even if some legislators voted in favor of the law based on their religious beliefs, that alone should not be able to render a law unconstitutional, absent a showing that the law promotes religious activity or excessively entangles church with state.

The dangerous legal theory espoused by the Fifth Circuit would compel the courts to scrutinize legitimate public policy decisions by lawmakers, to ferret out impermissible religious motives, and to strike down those

laws as constitutional violations. Laws against murder, theft, polygamy, child abuse, sodomy, drunk driving, etc., could not ultimately survive such a religious "search and destroy" motives test. This Court has consistently rejected this legal doctrine, which is unworkable and not demanded by the Constitution. The amicus curiae respectfully urge this Court to reverse the decision of the Fifth Circuit in this case.

I

A LAW THAT MERELY COINCIDES WITH A RELIGIOUS DOCTRINE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

This Court has consistently rejected legal challenges that argue that it is unconstitutional when religion undergirds the law. In *McGowan* v. *Maryland*, 366 U.S. 420 (1961), this Court rejected such an Establishment Clause challenge to Maryland's Sunday closing laws. Those opposing Maryland's law argued that Sunday closing laws sprang from the concept of the Christian sabbath. This foundation, they argued, created an impermissible religious basis for the state law. This Court rejected that argument. Chief Justice Earl Warren, in the opinion of this Court, wrote:

> However, it is equally true that the "Establishment" Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of

> adultery and polygamy. *Davis* v. *Beason*, 133 U.S. 333, *Reynolds* v. *United States*, supra. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.
>
> —366 U.S. at 442

Simply because some religions teach creationism, does not render the Louisiana law constitutionally unfit. The Louisiana Legislature named the law, "Balanced Treatment for Creation-Science and Evolution-Science Act." The implication from this title is that students learn both theories, and their supporting evidence. The Louisiana Legislature apparently wanted its public school students informed of all points of view.

This is exactly what the parties in *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) requested. In *Epperson*, the Supreme Court struck down Arkansas' anti-evolution law, which forbade the teaching of evolution in the public schools. A teacher challenged the law, because it limited what she could teach. Justice Black wrote that a parent subsequently joined the teacher in this case:

> She was subsequently joined by a parent who alleged his interest in seeing that his two then school-age sons "be informed of all scientific theories and hypotheses."
>
> —393 U.S. 110

Here, Louisiana is responding to the thrust of the *Epperson* case, to ensure that its students "be informed of all scientific theories and hypotheses." A law that requires all points of view on a controversial subject to be taught, cannot violate the Constitution of a free society.

In *Harris* v. *McRae*, 448 U.S. 297 (1980), this Court reaffirmed that a law which coincides with a religious teaching does not violate the Establishment Clause. In *Harris*, this Court rebuffed a challenge to the Hyde

Amendment, which virtually eliminates federal funding of abortions. Those favoring government funding of abortions argued, among other things, that the Hyde Amendment unconstitutionally codified Roman Catholic doctrine into federal law. This Court rejected that reasoning, saying:

> In sum, we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.
>
> —448 at 319-320

Harris further demonstrates the total unworkability of a constitutional doctrine that strikes down laws that coincide with a church's position. The plaintiffs in *Harris* included the Women's Division of the Board of Global Ministries of the United Methodist Church, and two of its officers. They challenged the Hyde Amendment saying it established Roman Catholic doctrine into federal law.

If this Court had adopted that legal argument, it would have snared itself in a double bind. No matter how it ruled in *Harris*, this Court would have sided with one church's doctrine. To rule in favor of the Hyde Amendment would have "established" Roman Catholic doctrine; to rule against the Hyde Amendment would have "established" United Methodist doctrine. This Court did the wise thing by junking this unworkable legal theory.

The D.C. Circuit Court of Appeals applied the principle of *McGowan* and *Harris* to the subject matter of evolution and creationism.[1] That court rejected a challenge to a

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[1] Other lower courts have unanimously rejected the reasoning that a law should be unconstitutional if it agrees with a religious doctrine,

Smithsonian Institution exhibit on evolution. The challenge said evolution impermissibly established the religion of Secular Humanism. The D.C. Circuit, in *Crowley* v. *Smithsonian Institution*, 636 F.2d 738 (D.C. Cir. 1980), wrote:

> The fact that religions involve acceptance of some tenets on faith without scientific proof obviously does not mean that all beliefs and all theories which rest in whole or in part on faith are therefore elements of a religion as that term is used in the first amendment. . . . So here, we cannot conclude that the exhibits in question are impermissible because their message may coincide or harmonize with a tenet of Secular Humanism or may be repugnant to creationism.
>
> —636 F.2d at 742-43

Here, Louisiana's law should not fall simply because it may "coincide or harmonize" with a tenet of religions that hold creation doctrines. Evolution and creationism should be treated in a constitutionally equal fashion. Louisiana exercised legitimate state power when it required both points of view to be taught, if either is taught, in its public schools.

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or was based on a religious doctrine. State criminal sodomy laws do not violate the Establishment Clause, *People* v. *Baldwin*, 112 Cal.App.3d 388, 112 Cal.Rptr 290, 291 (App., 1974) and *Stewart* v. *U.S.*, 364 A.2d 1205, 1208 (D.C. Ct. of App. 1976). A law allowing homosexual teachers to be fired does not violate the Establishment Clause, *National Gay Task Force* v. *Bd. of Ed. of Oklahoma City*, 729 F.2d 1270, 1273 (10th Cir. 1984). A law allowing homosexuals to be discharged from the military does not violate the Establishment Clause, *Hatheway* v. *Secretary of Army*, 641 F.2d 1376 (D.C. Cir. 1981).

States should not have to worry whether a new law "coincides too much" with a religious doctrine. Inevitably, some church or religious group can be found to agree with any law or public policy. This Court should affirm its position, laid down in *McGowan* and *Harris*, that laws which merely coincide with a religious belief are not unconstitutional.

II

A LAW'S ALLEGED "RELIGIOUS PURPOSE" SHOULD NOT ALONE BE SUFFICIENT TO DECLARE A LAW UNCONSTITUTIONAL

The Fifth Circuit struck down the Balanced Treatment Act, saying that it was permeated with religious motives. That court said the law failed under the first prong ("secular purpose") of the tripartite test enunciated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). Even if creationism were "fully supported by scientific evidence, the theory of creation is a religious belief," J.A. at A-7.

The Louisiana Balanced Treatment Act does not have a religious purpose, according to the language of the statute. The Louisiana law only commands that schools present the scientific evidence for both theories of origins, if either is taught. This promotes no religion.

In order for a law passed with an alleged "religious purpose" to be declared unconstitutional, it should be shown that the law somehow promotes religion activity as such, or excessively entangles the state with church. A state law should survive constitutional scrutiny if it promotes a legitimate state interest, regardless of the motives of the lawmakers. A law passed with "religious motivation" should only fall if it promotes religious activity, or excessively entangles the church with the state.

For example, suppose a religious group decided that if their state had better roads, then they could spread their gospel more effectively. The group could lobby the state legislature for more highway construction funding. If many lawmakers shared that religious view, and voted for increased highway funding, the courts would be compelled to strike down the highway funding bill, since its motive was religious, according to the Fifth Circuit's reasoning. "Religious purpose" alone should be insufficient to find a law unconstitutional.

A real life example illustrates this point. In *Andrews* v. *Shulsen*, 600 F.Supp. 408 (D.Utah 1984), a convicted murder challenged Utah's capital punishment law on the basis that the Mormon doctrine of blood atonement dictated the mode of execution (firing squad). Mormon doctrine requires that certain sins, such as murder, must be punished by the shedding of blood. Other methods of execution, such as electrocution, gassing, injection and hanging, do not spill blood. Therefore, Utah's execution by firing squad violates the Establishment Clause, it was argued, by enacting Mormon doctrine into law.

The district court rejected this argument, saying that the law did not promote Mormonism, but served a secular purpose of providing for a quick and inexpensive method of execution. Although Mormon doctrine may have correllated with the mode of execution, this did not violate the Establishment Clause.

Probably, some Mormon members of the Utah Legislature voted for execution by firing squad, because of the Mormon doctrine of blood atonement. But since the law served a legitimate secular purpose, the court upheld the law.

This is the same situation in the Louisiana case. Possibly, some members of the Louisiana Legislature voted for

the Balanced Treatment Act to coincide with their religious views of creationism. But the law's secular purpose is to promote academic freedom, and to ensure that evidence from all views comes before the eyes of students. Since students would see only scientific evidence, and not religious dogma, the schools cannot promote any religion under this law.

This Court recently dealt with a state law based on an impermissible religious motive. This Court struck down Alabama's silent prayer statute in *Wallace* v. *Jaffree*, 472 U.S. ___, 86 L.Ed.2d 29 (1985), saying that it did not have a secular purpose. This Court, in *Jaffree*, said that if a law does not have a clearly secular purpose, it is unconstitutional, and it is not necessary to look at the other two prongs of the *Lemon* test, 86 L.Ed.2d at 43.

The Louisiana law has the clear secular purpose of promoting academic freedom and the purpose of ensuring that students learn the scientific evidence of both evolution and creation. The *Jaffree* principle that "the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion," *supra*, simply does not apply here. Students exposed to neutral presentations of the scientific evidence supporting evolution and supporting creationism would be better equipped to evaluate both theories of origins. They would not be compelled to accept any specific religion, or any religion in general.

This situation differs greatly than the one in *Jaffree*. In *Jaffree*, students were engaging in an act traditionally associated with religion—silent prayer. Learning the scientific evidence for evolution and creationism is not a standard "religious practice," and does not inherently promote any religion.

State legislatures have the power to mandate curriculum for the public schools, *Edwards* v. *Aguillard*, J.A. at A-10. State legislatures can even require the teaching of subject matter with content on controversial moral issues. We think no court would invalidate laws requiring public schools to teach courses that condemn racial bigotry, illegal drug use, and drunk driving, or that oppose teenage pregnancies or nuclear war. These laws would not violate the Establishment Clause, even if the members of the legislature voted in favor of the law based on their religious beliefs. Alleged religious motives should not condemn laws promoting legitimate public policy goals.

CONCLUSION

Courts do not uphold the Establishment Clause by zealously striking down laws that happen to coincide or harmonize with the tenets of a religious group. This Court has affirmed that constitutional principle on several occassions. If courts can declare unconstitutional laws that harmonize with a church doctrine, then courts will have to gut the statute books of the land.

Furthermore, the Fifth Circuit erred by ruling that a religious motive will constitutionally sink a challenged law. Religious motives, without anything else, should not render a law unconstitutional. Whatever motivates a lawmaker should not suffice to strike down a law, unless it somehow promotes a religious activity, or excessively entangles the state with church. The Louisiana Balanced Treatment Act passes constitutional muster, and should be upheld. Concerned Women for America urges this Court to reverse the decision of the Fifth Circuit of Appeals, and uphold the law.

Dated: June 19, 1986

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